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11 **Attorneys for Defendants**

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15 **IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

16 INSWEB CORPORATION, LEADPOINT,  
17 INC., INTERNET BRANDS, INC. AND  
AUTO INTERNET MARKETING, INC.

18 Plaintiffs,

19 v.

20 AUTOBYTEL, INC., AUTOBYTEL 1  
21 CORP., F/K/A AVV, INC., DOMINION  
ENTERPRISES, RETENTION  
22 PERFORMANCE MARKETING, INC.  
AND ONECOMMAND INC.

23 Defendants.  
24

Case No. 08cv0447 WQH LSP

**FEDERAL RULE OF CIVIL  
PROCEDURE 26(F) JOINT  
DISCOVERY PLAN**

1 Plaintiffs InsWeb Corporation, Leadpoint, Inc., Internet Brands, Inc. and Auto  
2 Internet Marketing, Inc. (collectively, "Plaintiffs") and Defendants Autobyte, Inc.,  
3 Autobyte 1 Corp., f/k/a AVV, Inc., Dominion Enterprises, Retention Performance  
4 Marketing, Inc. and OneCommand, Inc. (collectively, the "Defendants"), by and through  
5 their respective counsel, hereby submit this Joint Discovery Plan.

### 6 **NATURE OF THE CASE**

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8 This case presents federal claims and counterclaims arising under 28 U.S.C. §§  
9 1331 and 1338. Plaintiffs have brought this patent infringement action claiming the  
10 '597 patent is infringed the Defendants. Defendants filed counterclaims alleging no  
11 infringement of the '597 Patent and have asserted that the '597 patent is invalid and is  
12 unenforceable. Plaintiffs allege that Defendants have not properly plead the claim of  
13 unenforceability.

### 14 **SUBJECTS OF DISCOVERY**

15 The material factual and legal issues which must be resolved and require  
16 discovery are: (1) validity of the '597 patent, (2) infringement of the '597 patent by the  
17 Defendants, (3) if properly in issue, whether the '597 patent is enforceable, (4) whether  
18 the alleged infringement was willful, and (5) and the amount of damages, if any, which  
19 would be sufficient to compensate Plaintiffs for any infringement that occurred.  
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### 21 **DISCOVERY PLAN**

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23 The parties, through counsel, having conferred by telephone in accordance with  
24 Rule 26(f) Fed. R. Civ. P., jointly propose the following schedule:

<b>Event</b>	<b>Plaintiffs Position</b>	<b>Defendants Position</b>
Exchange of Initial Disclosures Pursuant to Fed.R.Civ.P. 26(A)(1)	August 18, 2008	August 18, 2008
Disclosure of Asserted Claims and Preliminary Infringement Contentions and accompanying document production [Pat. L.R. 3.1-3.2]	November 21, 2008	September 8, 2008
Preliminary Invalidity Contentions and accompanying document production [Pat. L.R. 3.3-3.4]	January 21, 2009	November 7, 2008
Simultaneous Exchange of Proposed Terms, Preliminary Claim Constructions and Preliminary Identifications of Extrinsic Evidence [Pat. L.R. 4.1.a-b.]	February 4, 2009	November 21, 2008
Deadline to Amend Pleadings	TBD after second case management conference	December 1, 2008
Simultaneous Exchange of Responsive Claim Constructions [Pat. L.R. 4.1.c-d.]	February 18, 2009	December 5, 2008
Filing of Joint Claim Chart, Worksheet and Hearing Statement [Pat. L.R. 4.2]	March 4, 2009	December 19, 2008
Completion of Claim Construction Discovery [Pat. L.R. 4.3]	April 3, 2009	January 16, 2009
Opening Claim Construction Briefs [Pat. L.R. 4.4.a.]	April 17, 2009	January 30, 2009

Event	Plaintiffs Position	Defendants Position
Responsive Claim Construction Briefs [Pat. L.R. 4.4.b]	May 1, 2009	February 13, 2009
Claim Construction Hearing [Pat. L.R. 4.5]	June 8, 2009, subject to the Court's calendar	March 13, 2009; subject to the Court's calendar
Disclosure of Advice of Counsel [Pat. L.R. 3.8]	30 days after issuance of Claim Construction Order	Disclosure deferred until 30 days after the close of fact discovery, or until such time as Plaintiffs make a threshold showing of "objective recklessness" under the new willfulness standard of <u>In re Seagate Tech.</u> , 2007 U.S. App. LEXIS 19768 (Fed. Cir. August 20, 2007).
Second Case Management Conference to Discuss Remaining Dates	30 days after issuance of Claim Construction Order or as otherwise ordered by the Court	30 days after issuance of Claim Construction Order or as otherwise ordered by the Court

The parties agree that the resultant Scheduling Order can be modified only by agreement of the parties, or by order of the judge, or the magistrate judge if so authorized by the judge, and only upon a showing of good cause.

The parties agree that the limitations on discovery imposed by the Federal Rules of Civil Procedure should be applied in this case.

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**TOPICS SET FORTH IN L.R. 2.1.B.1-4****Reasons for Plaintiffs Proposed Schedule:**

As reflected above, Plaintiffs propose adjusting the deadlines to avoid due dates during the November, December and New Year holidays.

**Reasons for Defendants Proposed Schedule:** As indicated above, defendants propose modification of the deadline to disclose the advice of counsel. Specifically, defendants request that the deadline to make such disclosure be deferred until 30 days after the close of fact discovery, or until such time as Plaintiffs make a threshold showing of "objective recklessness" under the new willfulness standard of In re Seagate Tech., 2007 U.S. App. LEXIS 19768 (Fed. Cir. August 20, 2007). Counsel for defendants proposed a similar deference in *DR Systems, Inc. v. Fuji et al*, Case No. 06-417 (S.D. Cal.) which was granted by the Honorable Nita Stormes (Docket No.247; attached).

At this time, the parties have not decided whether to present live testimony at the Claim Construction Hearing, but agree to provide the Court their decision in filed Hearing Statement. The parties do not believe that specific limits on discovery relating to claim construction is necessary.

The parties propose the following order of presentation at the Claim Construction Hearing:

Plaintiffs' Introduction (if necessary)

Defendants' Introduction (if necessary)

Plaintiffs shall then present its argument on the first disputed term

Defendants shall present its argument on the first disputed term

The parties shall proceed in this manner for the remaining disputed terms.

**ELECTRONIC DISCOVERY**

The parties have discussed the production and exchange of electronic discovery and agree that each party's Electronically Stored Information (ESI) will be copied from Active/Archived email, shared network drives and active remote devices such as laptops and portable drives/media. The parties further agree that the parties will not be required to produce less-accessible ESI such as Backup Tapes/Data, Legacy Systems/Data, Voice/IM/PDA Data, and other data compilations, but that the parties will identify any such ESI that is responsive to a discovery request and undertake all reasonable efforts to make such ESI available for inspection. Files in native form will ordinarily not be produced, but counsel agree to: (i) use vendors or processes that do not limit production to a non-native format; (ii) produce spreadsheets in native format; and (iii) negotiate in good faith regarding production in native form of ESI if the requesting party can demonstrate that relevant information does not appear in the TIF images produced or that relevant metadata may exist. Certain types of ESI cannot be produced as a TIF image. These will be produced in their native form if responsive to a discovery request. With regard to documents that are attachments to other documents (e.g., documents attached to e-mails), the producing party will provide information, such as a log file, that lists the attachments to the document to which it is attached.

**PROPOSED PROTECTIVE ORDER**

The parties have exchanged and discussed the terms of an agreed proposed Protective Order as set forth in the Local Rules to protect confidential information of the parties and intend to file a stipulated Proposed Protective Order with the Court shortly.

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Dated: August 18, 2008

Respectfully submitted,

/s/ Timothy J. Haller  
/s/ Gregory P. Casimer  
/s/ Dina M. Hayes  
/s/ Frederick C. Laney  
/s/ Nicholas M. Dudziak

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16 SOUTHERN DISTRICT OF CALIFORNIA  
17

18 INSWEB CORPORATION,

19 Plaintiff,

20 v.

21 AUTOBYTEL, INC., AUTOBYTEL I  
CORP., f/k/a AVV, INC., and DOMINION  
22 ENTERPRISES,

23 Defendants.

Case No. 08-CV-0447 WQH (LSP)

**PROOF OF SERVICE**

24  
25 I declare as follows:

26 I am an attorney with the law firm of Luce, Forward, Hamilton & Scripps LLP, whose address  
27 is 600 West Broadway, Suite 2600, San Diego, California 92101-3372. I am a member of the bar of  
28 this court, over the age of eighteen years and not a party to this action.

On August 18, 2008, I caused the following to be served:

**FEDERAL RULE OF CIVIL PROCEDURE 26(F) JOINT DISCOVERY PLAN**

**Electronic Mail Notice List**

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**Manual Notice List**

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1 I declare that I am employed in the office at whose direction the service was made.

2 Executed at San Diego, California on August 18, 2008.

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